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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JAMES SIRIZZOTTI,<br><br>Defendant and Appellant. | B165430<br><br>(Super. Ct. No. LA041629) |
| In re JAMES SIRIZZOTTI,<br><br>on Habeas Corpus. | B168846 |

ORIGINAL PROCEEDING, application for writ of habeas corpus considered with an appeal from a judgment of the Superior Court of Los Angeles County. Darlene Schempp, Judge. Petition denied. Judgment affirmed and remanded with instructions.

Carol S. Boyk, under appointment by the Court of Appeal, for Defendant, Appellant and Petitioner.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels, Supervising Deputy Attorney General, and Susan Lee Frierson, Deputy Attorney General, for Plaintiff and Respondent.

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James Sirizzotti appeals his conviction for corporal injury to a cohabitant, Penal Code section 273.5, subdivision (a).[1] On appeal, Sirizzotti raises five matters: (1) insufficient evidence supported an element of charged offense, namely, that Sirizzotti and the victims were cohabitants; (2) the court erred in admitting evidence of an incident of prior domestic violence and instructing the jury as to the incident; (3) the court erred in failing to allow him to impeach the victim with evidence of her probationary status and other uncharged conduct amounting to moral turpitude; (4) the prosecutor engaged in prosecutorial misconduct when she commented on Sirizzotti's failure to testify; and (5) the cumulative errors require reversal. As set forth below, sufficient evidence supports the cohabitation element. We also conclude the court did not commit prejudicial error in admitting evidence of a prior incident of domestic violence or in its instruction to the jury. Likewise we find no abuse of discretion as to the court's rulings concerning Sirizzotti's efforts to impeach the victim. Finally, Sirizzotti has not demonstrated prejudicial error on his prosecutorial misconduct claim, nor do the errors, when considered together warrant reversal.

On a petition for writ of habeas corpus,[2] Sirizzotti asserts his counsel was ineffective for failing to object to the testimony of the judge (who presided over a case involving the prior incident of domestic violence); and the prosecutorial misconduct. In addition, he complains his counsel's conduct fell below the standard of care when he failed to cite certain Supreme Court authority in support of his argument to impeach the victim. Sirizzotti has failed to demonstrate his counsel's performance resulted in prejudice. Accordingly, we deny the petition.

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[1] All statutory references are to the Penal Code unless otherwise indicated.

[2] By prior order of this court, the appeal and petition for writ are considered together.

## *FACTUAL AND PROCEDURAL HISTORY*

**The Crime.**

Over more than a four-year period between 1998 and October 2002, Sirizzotti and Leslie R. had an intimate, dating relationship. During that time they sporadically lived together and shared an apartment. At one point they lived with Sirizzotti's parents. They also ended their relationship several times but then reconciled.

For the three weeks preceding October 4, 2002, they had been attempting to reconcile again. Although, Sirizzotti had a separate apartment at that time, he had a key to Leslie R.'s apartment and he had been staying with her. He also kept some personal possessions in her apartment. In addition, Leslie R. and Sirizzotti had been sexually intimate several times, though most of the time he slept on the couch.

Nonetheless, Leslie R. had decided that she wanted to end the reconciliation and wanted Sirizzotti to return to his own apartment. On the morning of October 4, 2002, after they ran several errands together, Leslie R. testified she told Sirizzotti she wanted to end their relationship and she wanted him to leave. According to Leslie R., an argument ensued, during which Sirizzotti grabbed Leslie R. by the throat and slammed her head onto the back of the couch. Leslie R. stated she received a bump on the back of her neck from being thrown to the couch. When she tried to stand-up he again grabbed her by the neck and pushed her back down. At some point Leslie R. picked up a plastic soda bottle and attempted to take a drink. Sirizzotti knocked the bottle out of her hands and as a result Leslie R. received a scratch on the side of her face. Sirizzotti grabbed Leslie R. again and held her down on the couch. He pulled out a fold-out pocket knife he kept clipped to his belt, unfolded the knife and held it up to Leslie R.'s face telling her he could or would "kill you any time I want, Bitch. You can't do anything you want. I can kill you right here."

Leslie R. convinced him to calm down. He allowed her to get up to use the restroom, but instead she escaped out the front door. Leslie R. called police from a nearby pay phone.

Police stopped Sirizzotti several blocks away from Leslie R.'s apartment, driving his pick-up truck. Sirizzotti told the officer that he had not done anything to Leslie R., whom he characterized as his fiancée and girlfriend. He told the officer Leslie R. had been drinking that morning and they had argued because he was attempting to leave and she had not allowed him to do so. Sirizzotti also told the officer that he had been involved in an altercation with a prior girlfriend several years before, that Leslie R. knew about that incident and would likely make-up a story similar to the prior incident to claim he had hurt her. A search of Sirizzotti and his vehicle failed to unearth a pocketknife.

Police interviewed Leslie R. and examined the apartment, which appeared to be in disarray with items knocked off the shelves and a soda bottle and a broken bottle of rum on the floor. Leslie R. did not deny she had consumed alcohol that morning. Officers also observed a scratch on her face.

**Trial Proceedings**

Sirizzotti was arrested and charged with: (1) corporal injury to a cohabitant and use of a deadly weapon during the commission of the offense (Count 1); (2) assault with a deadly weapon (Count 2); and disobeying a domestic relations order (Count 3).

Prior to trial, the prosecutor filed a motion to admit evidence of several prior incidents of domestic violence under Evidence Code sections 1101, subdivision (b) and 1109. These incidents included a 1992 incident involving a prior relationship with a Doreen S. In the 1992 incident it was alleged Sirizzotti had physically abused Doreen S., including threatening her with a knife. The relationship ended when Sirizzotti attacked Doreen S. while she was holding their infant daughter (hereinafter the "Doreen S. Incident").

The motion also concerned a 1996 incident with another former girlfriend, Christina L. The prosecutor represented that the relationship between Christina L. and

Sirizzotti was very similar to the one he had with Leslie R., in that it began with Sirizzotti as caring and thoughtful and deteriorated into him being physically and verbally abusive. In the 1996 incident, Christina L. had asked Sirizzotti to leave the apartment they shared, and they argued. Sirizzotti threw her to the floor and held her down. He threatened her with a small paring knife and using the knife scratched her chest, arm and back. Although the cuts broke the skin, they were not deep enough to scab; they healed within a week. Christina L. reported the incident to police and charges were filed against Sirizzotti. Christina L. testified that prior to the preliminary hearing, Sirizzotti called her to convince her to recant. He wanted her to claim her cat caused the scratches (hereinafter the "Christina L. Incident").

The prosecutor argued the Doreen S. Incident and the Christina L. Incident were admissible and probative and not overly prejudicial. The prosecutor's motion specifically addressed the application of Evidence Code section 352.

Sirizzotti opposed the motion and filed a motion in limine to exclude such evidence asserting admission of the incidents would create a danger of undue prejudice under Evidence Code section 352 (hereinafter "section 352").

At the hearing on the motions, Sirizzotti again argued that the prior incidents were dissimilar, remote and more prejudicial than probative. The court found the Doreen L. incident was too remote and ordered it excluded. As to the Christina L. Incident, the court ruled it was admissible under Evidence Code section 1109 (hereinafter "section 1109").

Thereafter during the trial, Christina L. related the details of the 1996 incident and admitted that she perjured herself at the preliminary hearing when she stated a cat made the scratches. The prosecution also presented testimony from four other witnesses concerning the Christine L. Incident. These witnesses included the officer who took the original police report and the detective who investigated it. The detective told the jury that in viewing the pictures of the scratches, Christina L.'s preliminary hearing testimony that a cat caused the scratches was unbelievable. The prosecution also called the judge

who presided over the preliminary hearing of the matter. The judge was permitted to opine, that in her review of the photos of the injuries she disbelieved Christina L.'s claim that the injuries were cat scratches.

During the trial, in addition to describing the October 4, 2002, incident, Leslie R. also told the jury that at the beginning of their relationship things had gone well, and Sirizzotti had been charming and respectful. At some point, the relationship became more volatile. On one occasion they got into an argument and as Leslie R. wrestled to get away she accidentally hit Sirizzotti in the eye with her keys, giving him a black eye. Another time she elbowed him in the stomach to get away from him. At one point while they lived with his parents, they argued and Sirizzotti pushed her and threw Leslie R.'s possessions out of the window. In early 2001, Sirizzotti threatened a man Leslie R. had formerly dated with an ax and when she moved out because of the incident, he vandalized her personal items. He also vandalized her car. In April 2002, she and Sirizzotti had gotten into an argument, which resulted in him hitting her with a bag of fast food. While Leslie R. reported the incident to police, she did not pursue the matter.

The jury convicted Sirizzotti on Count 1, violation of section 273.5 and found the weapons-use allegation true; but deadlocked on the assault alleged in Count 2. Sirizzotti pleaded guilty to Count 3 (i.e., disobeying a domestic relations order), and also admitted the allegation that he had suffered a prior conviction under section 273.5. The court sentenced him to a total of five years in state prison.[3]

Sirizzotti appeals. He also filed a petition for writ of habeas corpus.

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[3] The Attorney General notes that although Sirizzotti pled guilty and was convicted of disobeying a domestic relations order in Count 3, the trial court failed to impose a sentence on Count 3.

## *DISCUSSION*

### I. Sufficiency of the Evidence on the Cohabitation Element of Section 273.5.

In a criminal case, when sufficiency of the evidence is challenged on appeal our role in reviewing the evidence is limited. It is not our task to reweigh the evidence and substitute our judgment for that of the jury. (*People v. Escobar* (1996) 45 Cal.App.4th 477, 481.) Instead, we must look at the entire record to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Jones* (1990) 51 Cal.3d 294, 314.) On appeal, this court considers the evidence in the light most favorable to the prosecution and presumes the existence of every fact the trier could reasonably deduce from the evidence, in support of the judgment. (*Ibid.*) This court's authority on appeal begins and ends with a determination of whether any substantial evidence, disputed or not, supports the verdict. Thus, where the record discloses substantial evidence--that is reasonable, credible and of solid value--we accord due deference to the trier of fact. (*People v. Jones, supra,* 51 Cal.3d at p. 314.)

On appeal, Sirizzotti asserts insufficient evidence supported the jury's conclusion that he and Leslie R. were "cohabitants" for the purposes of section 273.5. We disagree.

A person violates section 273.5 where he or she "willfully inflicts upon his or her spouse, or . . . willfully inflicts upon any person with whom he or she is cohabiting . . . corporal injury resulting in a traumatic condition . . . ." (§ 273.5.) The term cohabitation as used in section 273.5 has been broadly interpreted to apply to individuals, even those who are not married, "living together in a substantial relationship--one manifested, minimally by permanence and sexual or amorous intimacy." (*People v. Holifield* (1988) 205 Cal.App.3d 993, 1000.) Section 273.5 requires more than a platonic, rooming house arrangement. (*People v. Ballard* (1988) 203 Cal.App.3d 311, 318.)

Nonetheless, the term has not been interpreted to require that the cohabitants' relationship be exclusive to each other or that they maintain only one sole residence together. (See *People v. Moore* (1996) 44 Cal.App.4th 1323, 1333-1334 ["The element

of 'permanence' in the definition refers only to the underlying substantial relationship, not to the actual living arrangement"].)

Although the October 4, 2002, assault was triggered by an argument concerning ending the relationship and Leslie R.'s request that Sirizzotti move out, prior to that morning they had lived together for three weeks and were attempting to reconcile. To that end, Sirizzotti spent the night at her apartment and kept a number of personal items in her home. She also indicated they had sexual relations with each other during that period.

Contrary to Sirizzotti's argument on appeal, the relationship was not already over at the time of the incident. Indeed, when questioned by police Sirizzotti characterized Leslie R. as his girlfriend and fiancée.

The evidence portrays a relationship near its end, at least from Leslie R.'s perspective, but that had not yet ended as of October 4, 2002. In our view sufficient evidence supports a finding the relationship qualified as "cohabitation" for the purposes of section 273.5. We note "cohabitation" has been found on evidence of an even less substantial relationship. For example, in *Holifield* during the three months prior to the assault the defendant stayed at three other places (other than the victim's motel room) for weeks at a time taking his personal possessions whenever he left. The victim and the defendant shared no expenses; he did not have a key to her room; they spent little time together and had infrequent sexual relations. The victim described their relationship as friends or roommates and denied they were intimate. (*People v. Holifield*, *supra*, 205 Cal.App.3d at pp. 995-996.) Nonetheless, the Court of Appeal upheld the finding the couple were cohabitants at the time of the assault. (*Id.* at p. 1002.)

Here, on the record before us, substantial evidence exists to sustain the finding Sirizzotti and Leslie R. were cohabitating on October 4, 2002.

## II. Admission of Christina L. Incident.

Sirizzotti presents three claims of error in connection with the admission of evidence concerning the Christina L. Incident: (1) all evidence of the incident should have been excluded under Evidence Code section 352; and (2) in the alternative, (a) the court erred in admitting the testimony of the superior court judge who presided in the preliminary hearing concerning the incident; and (b) erred in instructing the jury as to the Christina L. Incident. We consider each of these matters in turn.

### 1. Admission of the Christina L. Incident Under Evidence Code Section 352.

Below the trial court admitted the Christina L. Incident under section 1109, which provides, in pertinent part: ". . . in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to section 352." (Evid. Code, § 1109, subd. (a).) We review the court's decision to admit evidence under section 1109 for abuse of discretion. (See *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095-1097.)

Section 352 provides: "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) This court will not disturb a trial court's exercise of discretion under section 352 absent a showing the court acted in an arbitrary, capricious or patently absurd manner that resulted in a miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

On appeal, Sirizzotti asserts all evidence of the Christina L. Incident should have been excluded under section 352 and its admission was reversible error because: (a) the court admitted the evidence pursuant to section 1109, without expressly considering

whether it should be excluded under section 352; (b) the evidence was more prejudicial than probative; and (c) involved an undue consumption of time.

**a. The Court's Consideration of Section 352.**

Sirizzotti complains that in admitting the evidence under section 1109, the court failed to consider section 352. We do not agree. It is well established that while the record must affirmatively demonstrate the court applied section 352 as a prerequisite to admitting the evidence under section 1109, the trial court need not *expressly* weigh the prejudice against the probative value--or even expressly state that it has done so. (*People v.* Mickey (1991) 54 Cal.3d 612, 656; *People v. Williams* (1997) 16 Cal.4th 153, 213.) The trial court's implicit application of section 352 may be inferred where the record discloses counsel made arguments under section 352, or by the comments from the trial court. (*People v. Padilla* (1995) 11 Cal.4th 891, 924.) At bottom, the context and substance of the arguments may create the inference the court was aware of the section 352 issue and thus aware of its duty to apply the statute. (*Ibid.*)

Such is the case here. Sirizzotti's motions in limine as well as the prosecution's section 1109 motion specifically addressed the application of section 352 and the parties discussed the matter at the hearing. In comments, immediately preceding the court's ruling on the issue, Sirizzotti's counsel asserted the probative value of the Christina L. Incident was outweighed by the prejudice of admitting the evidence. Based on the record we conclude the court was aware of its obligations to apply section 352 and implicitly applied it.

**b. Undue Prejudice Analysis.**

Sirizzotti complains the court erred when it failed to exclude the Christina L. Incident as being unduly prejudicial under section 352. We disagree.

Preliminarily we note that 352 applies to prevent *undue* prejudice, that is "'evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues' not the prejudice 'that naturally flows from relevant, highly probative evidence.'" (*People v. Padilla, supra,* 11 Cal.4th at p. 925.) Moreover, the undue prejudice must *substantially outweigh* its relevance. (*People v. Ewoldt* (1984) 7 Cal.4th 380, 404.)

There is no question that evidence of the Christina L. Incident was prejudicial. However, we are not convinced that the prejudice was unfair or that it outweighed its probative value. The evidence showed the relationships between Sirizzotti and Leslie R. and Christina L. to be similar. Sirizzotti engaged in a pattern of relationships with these women that began romantically and after a couple of years became more volatile. When each woman asked him to move out the situation escalated into violence. Thus, the probative value of this evidence was high.

As to the prejudice, we conclude the Christina L. incident was no more egregious than the charged incident or the other evidence of prior incidents between Leslie R. and Sirizzotti. While it is true Sirizzotti actually injured Christina L. with a knife, and did not use the knife on Leslie R., that does not render the Christina L. Incident more inflammatory. Indeed, Leslie R. was also injured during the altercation; she struck her head on the couch and received a scratch from the soda bottle. The physical injuries to both women were equally minor. Moreover, we do not believe the jury would have been inclined to punish Sirizzotti for the Christina L. Incident. Any emotional bias the jury may have obtained against Sirizzotti because of the Christina L. incident pales in comparison to the prior numerous violent incidents between Sirizzotti and Leslie R.. The jury was also admonished as to the limited use of this evidence. The admonishment reduces the possibility of jury confusion and the potential the jury unfairly punished Sirizzotti for the prior incident.

Furthermore, the Christina L. Incident was not too remote, as it occurred six years before the charge offense. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 405 [court has found

admissible under section 352 evidence of prior incident of misconduct which occurred 12 years before the charged offense]; see also Evid. Code § 1109, subd. (e) [prior incidents occurring as late as 10 years prior to current incident admissible].)

Finally, the Christina L. Incident played a role in Sirizzotti's defense. To support his claim of innocence, Sirizzotti told investigators about the Christina L. Incident and claimed Leslie R. knew about it and that Leslie R. would likely make-up a story similar to the prior incident to claim he had hurt her. Sirizzotti's use of the Christina L. Incident undermines his contention evidence of the incident was unduly prejudicial.

In short, Sirizzotti has not demonstrated that the prejudice arising from the admission of the Christina L. Incident substantially outweighed its probative value.

**c. Undue Consumption of Time.**

On appeal, Sirizzotti also asserts the presentation of evidence of the Christina L. Incident consumed too much time in the trial and should have been excluded under section 352.

The problem with this contention is Sirizzotti failed to raise it below. Neither in connection with the motion in limine nor during the trial did Sirizzotti complain the evidence of the Christina L. Incident was unduly time consuming under section 352. While the motion in limine cited section 352, it did so only in connection with the argument that the evidence was prejudicial. A motion in limine preserves for appeal only those precise allegations of error specifically addressed in the motion. (See *People v. Morris* (1991) 53 Cal.3d 152, 189-190.) Thus, to assert his claim here, Sirizzotti should have objected during the trial when it became apparent the presentation of this evidence was going to run afoul of section 352 because of the consumption of time. Had he made a timely objection under section 352 or even requested the court to reconsider the admission of the evidence under section 1109, in light of the consumption of time, the trial court could have remedied any potential error by limiting the number of witnesses

concerning the Christina L. Incident. His failure to raise this specific legal ground below deprived the trial court of the opportunity to address the situation and therefore, constitutes a waiver of the matter on appeal. (Evid. Code, § 353; *People v. Kipp* (2001) 26 Cal.4th 1100, 1124.)

In sum, we conclude the trial court did not abuse its discretion in admitting the Christina L. Incident under section 352.

**2. Admission of Testimony from a Superior Court Judge.**

Sirizzotti asserts the court erred in admitting the testimony of the judge who presided over the preliminary hearing concerning the Christina L. Incident because the testimony was irrelevant, inherently prejudicial and because the judge was not qualified to offer opinion testimony on the cause of Christina L.'s injuries. Sirizzotti's counsel did not assert these objections below. Normally Sirizzotti's failure to object would end our inquiry into the matter.

However, in his habeas corpus petition, Sirizzotti claims the failure to object constitutes ineffective assistance of counsel. Therefore we examine the merits of his contention in conjunction with our consideration of whether counsel's conduct fell below the standard of care and whether Sirizzotti suffered prejudice as a result.[4]

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[4] Given we review this matter in the context of a petition for habeas corpus, we observe that our analysis is guided by certain principles unique to the procedural posture of these petitions. Because a petition for writ of habeas corpus seeks to collaterally attack a preemptively final criminal judgment, the petitioner bears a heavy burden to plead and later prove sufficient grounds for relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) In addition, where as here, after considering the petition, the return and traverse, this court finds there are no disputed factual questions as to matters outside the trial record, the merits of the habeas corpus petition can be decided without an evidentiary hearing. (*Id.* at p. 478.)

**Sirizzotti Failed to Demonstrate He Was Prejudiced By His Counsel's Conduct.**

To establish a claim of ineffective assistance of counsel, the defendant must prove both counsel's representation was objectively deficient, below a reasonable standard of care under prevailing professional norms, and prejudice flowing from the deficient performance, that is, but for counsel's errors, the defendant would have received a more favorable result. (*People v. Waidla* (2000) 22 Cal.4th 690, 718.) Defendant has the burden of proving an ineffective assistance. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218.)

Given the difficulties inherent in making this evaluation, this court indulges in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered a sound trial strategy." (*People v. Thomas* (1992) 2 Cal.4th 489, 530-531.)

Moreover, a reviewing court need not determine "whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*In re Fields* (1990) 51 Cal.3d 1063, 1079.) Defendant must affirmatively demonstrate prejudice. It is not sufficient for the defendant to show the error had some "conceivable effect" on the outcome of the proceeding; defendant must prove that there is a "reasonable probability," that absent the errors the result would have been different. (*People v. Ledesma, supra,* 43 Cal.3d at pp. 217-218.)

With these principles in mind, we turn to Sirizzotti's contentions concerning the judge's testimony. In our view, the court should have excluded the judge's testimony because it was cumulative of testimony given by other witnesses whose status did not present the same potential for prejudice. Christina L. testified her scratches had not been made by a cat and admitted she perjured herself when at the preliminary hearing she

claimed that a cat had caused them. In addition, the detective who investigated the Christina L. Incident also testified the scratches did not appear to have been made by a cat. The judge's and the detective's testimonies were essentially identical. The judge's testimony added nothing to the testimony of these two witnesses.

A timely motion to exclude the evidence as cumulative would have resulted in its exclusion. In his trial counsel's declaration attached to the petition, counsel asserts he had no tactical reason not to seek the exclusion of the testimony. This notwithstanding, Sirizzotti has not carried his burden of establishing prejudice. Indeed, the fact that the evidence was cumulative undercuts the claim of prejudice. Even had the court excluded the judge as a witness, the jurors would nonetheless have heard substantially the same evidence from other witnesses. Moreover, exclusion of the judge's testimony would not have diminished the strength of the evidence against Sirizzotti with respect to the crimes charged involving Leslie R. We are not convinced that absent the admission of the judge's testimony the result would have been different.

Based upon our review of the trial court proceedings and argument submitted with the writ petition, we conclude Sirizzotti has failed to establish a reasonable probability that he suffered prejudice as a result of his counsel's conduct. Such failure is fatal to his claim he was deprived effective assistance of counsel. Sirizzotti has not satisfied his burden to prove sufficient grounds for extraordinary relief, and accordingly he is not entitled to a writ of habeas corpus on this claim.

### 3. Failure to Properly Instruct the Jury on Christina L. Incident.

The court instructed the jury concerning the Christina L. Incident using CALJIC No. 2.50.02. This instruction informed the jury that evidence had been introduced to show that Sirizzotti engaged in a prior incident of domestic violence. It defined "domestic violence" as "abuse" committed against a cohabitant, and thereafter defined "abuse" as "intentionally or recklessly causing or attempting to cause bodily injury, or

placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another." During its deliberations the jury sent a note to court, requesting "[a] legal definition for the word recklessly" as used in the instruction. The court responded, "Ladies and gentlemen there is no magical definition of the word 'recklessly.' It is just a common everyday usage of the word. I looked through the footnotes to see if there is anything where it had ever been used in a case that gave a specific definition, but there is none." Sirizzotti's counsel did not object to the court's response to the jury.

On appeal, Sirizzotti asserts the court erred in failing to give a legal definition to the jury for the term "recklessly" when they requested one.

"An appellate court applies the abuse of discretion standard of review to any decision by a trial court to instruct, or not to instruct, in its exercise of supervision over a deliberating jury." (*People v. Waidla* , *supra*, 22 Cal.4th at pp. 745-746.)

A court has a *sua sponte* duty to instruct the jury on the general principles of law relevant to the issues in the case and to give explanatory instructions when terms used in an instruction have a "technical meaning peculiar to the law." (*People v. Reynolds* (1988) 205 Cal.App.3d 776, 779.) In other words, when a word "'is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request.'" (*People v. Estrada* (1995) 11 Cal.4th 568, 574.) A word has a "technical legal meaning" in this context where its definition *differs* from the non-legal meaning. Words in instructions require clarification when their statutory definition differs from the meaning that might be ascribed to the same terms in common parlance. (*Id.* at pp. 574-575.)

When, however, the jury requests further clarification of a word, then a court has a "primary duty to help the jury understand the legal principles it is asked to apply." (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1015.) While the court still retains discretion in deciding whether to elaborate on the standard instructions, a definition of a

commonly used term may nevertheless be required if the jury exhibits confusion over the term's meaning. (*Ibid.*)

Here, Sirizzotti claims that the term recklessly has a technical meaning under the law and that the court erred in telling the jury to apply the common everyday meaning of the word. Sirizzotti's argument is based on language contained in *In re Steven S.* (1994) 25 Cal.App.4th 598, 614-615, where the defendant challenged the use of the term "reckless disregard" in Penal Code section 11411,[5] as unconstitutionally vague. In concluding "reckless disregard" withstood constitutional scrutiny, the Court of Appeal examined the use of the word "reckless" elsewhere in the Penal Code. The court observed the term "recklessly" had been defined in an arson statute, Penal Code section 452, which derived from the Model Penal Code definition of "recklessness."[6] Based on its use in the Penal Code, the *In re Steven S.* court concluded the word "reckless" had acquired a "peculiar meaning in the law of California-the meaning adopted by the drafters of the Model Penal Code." (*Id.* at pp. 614-615.) Sirizzotti asserts that given the language in *In re Steven S.*, the trial court should have given the jury a legal definition of the term recklessly when they asked for one.

Of course, the factual context of *In re Steven S.* differs from the one before us. Sirizzotti is not challenging the constitutionality of the term in CALJIC No. 2.50.02 and *In re Steven S.* The court did not consider the issue of whether the term "recklessly" has a technical legal meaning that differs from its non-legal meaning. The fact that the terms "reckless" and concept of "recklessness" has been used in various California Penal

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**5** Penal Code section 11411 proscribes the burning or desecrating a cross or other religious symbol on private property.

**6** Pursuant to the Model Penal Code section 2.02, subdivision (2)c, "[a] person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard

statutes and that an arson statute actually defined the term "recklessly" based on a Model Penal Code, does not necessarily mean that the use of the term in CALJIC No. 2.50.02 has a technical meaning unique to the law *that differs from the non-legal meaning*.

But even if we were to conclude that it did, Sirizzotti has never (not here nor in the trial court) suggested which legal definition should have been given to the jury. In addition, assuming the jury should have been instructed with the Model Penal Code definition of "recklessly," Sirizzotti has not demonstrated he would have been acquitted of the charges if the jury had been given the definition of recklessly. (*People v. Solis*, *supra*, 90 Cal.App.4th at p. 1015 [*Watson* harmless error standard applies to errors in failing to define legal terms when a jury requests a clarification].) Based on the evidence presented at trial, a reasonable jury would have concluded Sirizzotti's mental state in attacking Christina L. was more intentional than mere recklessness (as defined by the Model Penal Code definition) and in fact verged on willfulness. Furthermore, the instruction at issue related only to the prior incidents of domestic abuse, not to the underlying charges involving Leslie R.. The instruction informed the jury that even if it determined the prior incidents occurred, it was free to disregard them. Moreover, the jury was informed that its findings about the prior incidents of domestic abuse would not diminish the duty to decide Sirizzotti's guilt on the underlying charges beyond a reasonable doubt. Thus, in our view, even had the jury been given a legal definition of the term "recklessly" we are not persuaded that it is reasonably probable he would have received a more favorable result at trial.

## III. Impeachment Evidence Concerning Leslie R.

Prior to trial Sirizzotti indicated to the court that he intended to impeach Leslie R. with evidence of her prior crimes and uncharged criminal conduct. Specifically, he

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involves a gross deviation from the standard conduct that a law-abiding person would observe in the actor's situation."

wanted to introduce evidence concerning Leslie R.'s conviction for a DUI in 2000 and a 1994 conviction for prostitution.

The court precluded Sirizzotti from questioning Leslie R. about the 2000 DUI conviction, finding that it was not a crime of moral turpitude. At the time of trial Leslie R. was serving probation for the conviction. At no time during the pretrial discussion of these matters, or later during the trial did Sirizzotti assert he intended to impeach Leslie R. with her *probationary* status for the DUI offense. Although Sirizzotti mentioned Leslie R.'s probationary status in passing, all of the arguments below focus on whether the fact of the conviction was admissible, not on the fact she was then serving probation for the DUI conviction.

The court also excluded evidence of the prostitution conviction, concluding the 1994 conviction was too remote. Sirizzotti responded that although Leslie R. had no recent convictions for prostitution, he believed Leslie R. had recently been involved in uncharged acts of prostitution and that if she admitted to such conduct on the stand, it would constitute conduct involving moral turpitude for the purposes of impeachment. The court refused to allow Sirizzotti to question Leslie R. about any prostitution allegations.

Sirizzotti now complains the trial court erred in failing to allow him to impeach Leslie R.'s credibility with evidence of her probationary status and her conduct as an alleged prostitute. We disagree.

**1. Probationary Status.**

Because Sirizzotti failed to raise the issue of Leslie R.'s probationary status as a ground for impeachment in the trial court he is precluded from asserting error on appeal. (Evid. Code, § 354, subd. (a).)

In his habeas corpus petition, however, Sirizzotti, asserts his counsel's performance with respect to this issue was incompetent. Specifically he asserts his

counsel was ineffective in failing to cite *Davis v. Alaska* (1973) 415 U.S. 308, as authority for the proposition that probationary status is fertile ground for impeachment and to show witness bias under the Sixth Amendment's right to cross-examination.

Sirizzotti reads *Davis* too broadly to apply here. In *Davis* the defendant, on trial for larceny and burglary, sought to cross-examine a key eyewitness against him with the fact the witness was on probation for a juvenile adjudication for burglary at the time the witness identified the defendant as the perpetrator of the crimes charged. The defense wanted to show the witness' testimony might be biased because of his "vulnerable status" as probationer and in particular because the witness would be concerned he might also be a suspect in the burglary charged against the defendant. (*Id.* at pp. 310-311.)

The Alaska state courts precluded the defendant from questioning the witness on these matters citing its interest to protect anonymity of juvenile offenders. The United States Supreme Court disagreed, finding the state's interest gave way to a defendant's Sixth Amendment right to cross-examine his accusers. The *Davis* court concluded that subject to the trial court's broad discretion to preclude repetitive and unduly harassing questioning, the defendant had a right to cross-examine the witness about his probationary status to show the witness felt undue pressure from the police to identify the defendant out of fear his probation might be revoked or to deflect attention away from his possible involvement in the burglary. (*Id.* at pp. 315-319.) The High Court noted that such cross-examination was necessary to show the existence of possible bias and prejudice. (*Id.* at p. 319.) This notwithstanding, Justice Stewart, in his concurrence, cautioned the opinion should not be read to conclude the Constitution conferred a right in every case to impeach a witness on such matters. (*Id.* at p. 321.)

In our view, a citation to *Davis* would not have assisted Sirizzotti because it is distinguishable from the instant case, and its distinctions are important. Unlike in *Davis,* Sirizzotti sought to impeach the victim of the crime, not merely an eyewitness and potential suspect. There is no evidence Leslie R. called police to report the October 4, 2002, incident to deflect attention away from her conduct. Also different is the fact that

the crime for which she was on probation, a DUI is not a crime of moral turpitude, while the burglary committed by the eyewitnesses in *Davis* was a crime of dishonesty and in fact was the same type of offense charged against the defendant. Finally, in contrast to *Davis*, which turned on the witness' identification of the defendant, here there was no doubt about the identity of the parties involved and thus, there was not the same opportunity for the police to use undue pressure upon Leslie R. to implicate Sirizzotti. In fact, there is no proof that the police who responded to Leslie R.'s 9-1-1 call had any awareness of her probationary status at the time, so the likelihood of them using her status to pressure her is minimal in comparison.

The defendant's right to cross-examine a witness, while appropriately broad, is not boundless. The defendant must make some threshold showing that the proposed subject matter of the impeachment would reveal a possible bias, prejudice or an ulterior motive of the witness. In our view, the mere fact a witness is on probation, standing alone, does not inherently make the probationer "vulnerable" or show that the witness might be biased. Because of the potential prejudice and jury confusion that might arise from disclosing such matters, probationary status should be viewed in its factual context. Sirizzotti has not convinced us that Leslie R.'s status as a probationer was particularly vulnerable, threatened or at risk such that she would have bias or an ulterior motive to falsely accuse him of the charges.

In any event, as *Davis* recognizes the trial court retains broad discretion to control questioning, so even had Sirizzotti's counsel cited *Davis* the trial court could have nonetheless precluded him from questioning Leslie R. about her probation. Sirizzotti has not demonstrated that his counsel's conduct fell below the standard of care in failing to cite to *Davis* or that any such error resulted in prejudice. Sirizzotti has not satisfied his burden to prove sufficient grounds for extraordinary relief, and accordingly he is not entitled to writ of habeas corpus on this claim.

### 2. Prostitution.

On appeal, Sirizzotti asserts he should have been permitted to question Leslie R. on whether she had been recently involved in uncharged acts of prostitution. His argument on appeal centers on a claim that the confrontation clause of the Constitution entitled him to cross-examine her on those issues, but below the discussion of these matters focused on the admissibility of the evidence under section 352, as shown by the court's exclusion of the 1994 conviction as too remote to be probative.

Because Sirizzotti did not assert the confrontation clause as the precise legal ground for admission of this evidence in the trial court he has waived it for the purposes of the appeal. But even if he had preserved this argument, the trial court still retained discretion to exclude this evidence, notwithstanding the confrontation clause, under section 352. (*People v. Quartermain* (1997) 16 Cal.4th 600, 623.) We conclude the court did not abuse its discretion in precluding Sirizzotti from asking about acts of prostitution. Sirizzotti's claim Leslie R. was involved in such recent activities was based entirely on statements Leslie R. had allegedly made to Sirizzotti and nothing more. It appears the court viewed Sirizzotti's evidence of the conduct as too thin and insubstantial to allow him to question her about it. We cannot say this decision amounted to an abuse of discretion or resulted in a miscarriage of justice, especially in view of the potential prejudice resulting from parading such matters in front of a jury.

## IV. Prosecutorial Misconduct.

Sirizzotti asserts the prosecutor engaged in misconduct in violation of *Griffin v. California* (1965) 380 U.S. 609, when, during her closing argument she made two indirect references to his failure to testify.

Specifically, Sirizzotti points out the prosecutor said:

> "They [the defense] presented no evidence, not one iota, not one scintilla of evidence to disprove what Leslie Leslie R. testified to from that witness stand. [ ] No one witness came into this courtroom took, that witness stand and said I was there. I saw it. [ ] It didn't happen. Not a one."

At a later point during the argument the prosecutor stated:

> "Now, again, and I want you to focus on this because it is critical. There have been no witnesses, there has been no testimony from that witness stand, and that's the only testimony you could consider, that which comes under oath from that witness stand, to contradict what Miss Leslie R. told you."

Sirizzotti did not object to either of these statements.

A prosecutor's direct or indirect comment on the defendant's failure to testify violates the Fifth Amendment protection against self-incrimination. (*Griffin v. California*, *supra*, 380 U.S. 609, 615; *People v. Hughes* (2002) 27 Cal.4th 287, 371.) An indirect comment violates *Griffin* when the prosecutor argues that certain evidence is uncontradicted, if such a contradiction or denial can only be provided by the defendant. (*People v. Hughes*, *supra*, 27 Cal.4th at p. 372.) *Griffin* error also exists where the prosecution refers to an absence of evidence to which only the defendant's testimony could provide. (*People v. Murtishaw* (1981) 29 Cal.3d 733, 757.) Such is the case here, Leslie R. and Sirizzotti were the only two individuals present during the October 4, 2002, incident and thus the only person who could provide evidence to contradict Leslie R. would be Sirizzotti. Thus, the prosecutor's comments amounted to prosecutorial misconduct.

The Attorney General does not defend the comments, but instead points out that Sirizzotti's failure to object to them during the trial bars him from asserting the claim on appeal. This is correct. The failure to object is fatal to the claim of prosecutorial misconduct on appeal unless Sirizzotti can show that a timely objection and admonition

to the jury would *not* have cured the harm. (*Id.* at p. 758.) In our opinion, a timely objection to the first comment would have probably cured the effect of the misconduct. We have no reason to assume the district attorney would have made the second improper reference had the court sustained the objection to the first comment and admonished the jury to disregard it. Consequently, Sirizzotti's *Griffin* error claim is waived on appeal. (See *People v. Mitcham* (1992) 1 Cal.4th 1027, 1050.)

This conclusion, however, does not complete our analysis. In his habeas corpus petition, Sirizzotti claims his counsel's failure to object to the prosecutor's improper comments constituted ineffective assistance of counsel. We reject this assertion because Sirizzotti has not demonstrated the requisite prejudice. The comments were brief and relatively mild. Moreover, the reference to Sirizzotti was indirect. Finally, any possible prejudice was dispelled by the jury instructions. Form instruction CALJIC No. 2.60, told the jury the defendant had a constitutional right to not testify and they should not consider, or draw any inference from the fact Sirizzotti did not testify. The jury was also instructed with CALJIC No. 2.61 which informed them that "[n]o lack of testimony on defendant's part will make up for the failure of proof by the People . . . ." Sirizzotti has not shown that but for his counsel's failure to object to the prosecutorial misconduct the outcome of his trial would have been different. Sirizzotti is not entitled to writ relief on this claim.

## V. Cumulative Error.

Finally, Sirizzotti asserts that the cumulative effect of all of the errors during the trial requires a reversal of the judgment.

As foregoing discussion indicates we found only two errors in the trial, namely, the presentation of testimony from the judge who presided in the Christina L. preliminary hearing and the prosecutor's two, brief and indirect comments about Sirizzotti's failure to testify. We have concluded both of these errors were harmless. Sirizzotti has not

convinced us that these errors taken separately or together resulted in a miscarriage of justice. (Compare *People v. Hill* (1998) 17 Cal.4th 800, 844-845 [court found numerous errors committed below including serious, continuous and blatant misconduct by the prosecutor, the trial court's abdication of its judicial role, several serious instructional errors].)

## ***DISPOSITION***

The petition for writ of habeas corpus is denied. The cause is remanded for sentencing on the conviction on Count 3. The judgment is affirmed in all other respects.

WOODS, J.

We concur:

PERLUSS, P.J.

JOHNSON, J.